OOI CHEK CHAI & ANOR

v.

LOW THOW YOONG SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: P-02-414-96]
24 JANUARY 2000

LAND LAW: *Caveat - Appeal against removal of - Correct test to be applied - Whether judge exercised discretion properly - Whether any reason for appellate interference*

This was the appellants' appeal against the refusal of the learned judge to extend the caveats they had earlier lodged on the grounds that there were no serious questions to be tried and that the balance of convenience laid in favour of removing them.

Held:
Per Gopal Sri Ram JCA

[1] The learned judge had applied the correct test as laid down in *Eng Mee Yong v. Letchumanan.* There were no serious questions to be tried and the balance of convenience was in favour of removing the caveats.

[2] The initial function of an appellate court is one of review only; it has no original discretion. The learned judge had exercised his discretion properly and there was thus no reason for appellate interference.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu memfailkan rayuan terhadap keputusan yang arif tuan hakim menolak permohonan perayu untuk melanjutkan kaveat di atas alasan bahawa tidak terdapat persoalan yang serius untuk dibicarakan dan imbangan kemudahan memihak kepada pemansuhan kaveat.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Yang arif tuan hakim telah menggunapakai ujian yang betul sebagaimana yang dikemukakan di dalam *Eng Mee Yong v. Letchumanan.* Tidak terdapat persoalan yang serius untuk dibicarakan dan imbangan kemudahan memihak kepada pemansuhan kaveat.

[2] Fungsi awal mahkamah rayuan hanyalah mengkaji semula; ia tidak mempunyai budibicara asal. Yang arif tuan hakim telah menggunakan budibicaranya dengan betul maka dari itu tiada sebab bagi mahkamah rayuan untuk masuk campur.

[Rayuan ditolak.]

Case(s) referred to:
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Lau Brothers & Co v. China Pacific Navigation Co Ltd [1965] 1 MLJ 1 ***(refd)***
United Scientific Holdings Ltd v. Burnley Borough Council [1978] AC 904 ***(refd)***

For the appellants - M Navaratnam; M/s Ghazi & Lim
For the respondent - Karin Lim; M/s Presgrave & Matthews

[Appeal from High Court, Pulau Pinang; Summons No: 22-71-96]

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

This appeal is directed against the order of the learned judge in Penang refusing extension of the caveats lodged by the appellant on 1 April 1995 and 12 June 1995. The case for the appellant is that the learned judge erred in holding that there were no serious questions to be tried and that the balance of convenience lay in favour of removing the caveats.

The basic facts which this appeal raise are not in dispute. They have been dealt with *in extenso* by the judge and we are spared from repeating them here. The starting point is an option issued by the respondent to the 1st plaintiff in the court below. The option also expressed itself to be valid until noon 28 March 1995. The appellant readily conceded before us that the option was not exercised within the period stipulated.

In accordance with settled principles it follows that the offer contained in the option lapsed upon its expiry. (See, *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904). Mr. Navaratnam however argued that despite non-exercise of the option, the parties had nevertheless entered into fresh negotiations that culminated into an agreement. He had taken us through the correspondence exchanged between the solicitors for the respective parties. We have examined the correspondence and we find ourselves in agreement with the learned judge that at the end of the day the parties were still negotiating and there was no concluded agreement between them. In our view, the present case is governed by the decision in *Lau Brothers & Co v. China Pacific Navigation Co Ltd* [1965] 1 MLJ 1.

It is sufficient to quote from head notes of that case:

> This was a claim for damages for breach of 'a contract for failure to take delivery of logs.' It was argued for the plaintiffs that the parties had by the exchange of five telegrams effected a binding contract. Subsequent to the exchange of these telegrams there were letters in which *inter alia* the method of payment was discussed. Eventually the defendants wrote to the plaintiffs informing them that they considered the transaction unsuccessful. The question was whether there was a binding contract.
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> Held: (1) Where a contract is to be found in letters, it is necessary to take the whole of the correspondence into consideration to ascertain whether the parties have come to binding agreement;
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> (2) in this case the parties were still in state of negotiation and the defendants were justified in withdrawing their offer. *Hussey v. Horne Payne* 4 App Cas 311 Bristol Cardiff and *Swansea Aerated Bread Co v. Maggs* [1890] 44 Ch D 616 *May v. Thomson* 20 Ch D 705 723.

Having found ourselves in agreement with the learned judge upon the issue whether there is a serious question to be tried, little remains in the appeal. Suffice to say the learned judge applied the correct test as laid down by the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212.

Although it was not strictly necessary for him to do so; after having held there was no serious questions to be tried; the learned judge went on to hold that the balance of convenience lay in favour of the caveats being removed. In doing so, he was exercising the discretion vested in him by Parliament. The principles by which an appellate court is bound to act in such a matter as this are well settled and beyond argument. Initially our function is one of review only. We have no original discretion. It is only when the appellant satisfies this court that a discretion has been wrongly exercised or that the judge failed to take into account some relevant matters or took into account irrelevant matters, that this court may intervene.

The present appeal is plainly not such a case. We are entirely satisfied that the learned judge exercised his discretion properly having regard to the facts before him and that this appeal must be dismissed without the necessity of calling upon the respondent. The appeal is dismissed with costs. The orders of the learned judge are affirmed. The deposit in court shall be paid out to the respondent to account of its taxed costs.